IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 77 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VIRAMJI MANAJI THAKOR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 77 of 1993

MR JM BUDDHBHATTI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR DP JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 06/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. In this appeal, which is filed under Section 374 (2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated July 31, 1992 rendered by the Ld. Addl. Sessions Judge, Mehsana in Sessions Case No. 121 of 1992 by which he is convicted of the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment (RI) for life.

2. The marriage of the appellant had taken place with deceased Taraben and the appellant and his deceased wife were staying together in village Malekpur, Taluka Kheralu, District Mehsana. During the subsistence of marriage deceased Taraben had given birth to a girl child named Nirma, who was aged 2 years on the date of incident. The incident in question is alleged to have taken place during night hours of January 28/29, 1992 any time between 10.00 p.m. to 4.00 p.m. The prosecution has claimed that the deceased was not satisfying sexual desire of the appellant as a result of which the appellant was entertaining a suspicion that the deceased had an affair with another person and on this suspicion the appellant had strangulated his wife to death. According to the prosecution after the incident the appellant had informed his mother, who was staying with his elder brother Keshaji as well as his brother that his wife had fallen sick and therefore the mother of the appellant had gone to his house and found that the deceased was dead. Keshaji had given information at Kheralu Police Station on January 29, 1992 to the effect that his sister-in-law i.e. wife of the appellant had died because of illness. The prosecution case is that witness Divaben Babuji, who is mother of the deceased was informed by 3 or 4 persons of village Malekpur that deceased was suffering from cerebral fever as well as was not speaking and therefore, she had gone to Malekpur and found that the deceased had expired. The further case of the prosecution is that the appellant was beating his wife on suspicion and, therefore, witness Divaben Babuji, who was mother of the deceased had lodged complaint at Kheralu Police Station expressing suspicion against the appellant and others about unnatural death of her daughter. On receipt of information from the mother of the deceased, Mr. N.D. Dodia, who was then Police Inspector of Kheralu Police Station had arranged for post mortem examination of the dead body. The certificate issued by doctor who had performed autopsy on the dead body indicated that deceased had died due to asphyxia,

which was result of homicidal strangulation. In view of the contents of the certificate, P.I. Mr. Dodia lodged complaint against the accused with Kheralu Police Station, which was registered by the officer incharge of the Police Station. The investigation in the case was carried out by the Police Inspector Mr. Dodia and he had recorded the statements of witnesses who were found conversant with the facts of the case. On conclusion of the investigation, the appellant was charge-sheeted in the Court of the Ld. Judicial Magistrate First Class, Visnagar for the offence punishable under Section 302 of the Indian Penal Code.

3. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Mehsana for trial where it was numbered as Sessions Case No. 121 of 1992. The charge at Exh.1 was framed by the Ld. Addl. Sessions Judge, Mehsana against the appellant for the offence punishable under Section 302 of the Indian Penal Code The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried.

4. Therefore, the prosecution examined (1) Divaben Babuji P.W.1 Exh.9, (2) Dr. Tusharbhai Mohanbhai Setalwad P.W.2 Exh.10, (3) Rajiben Shambhuji P.W. 3 Exh. 13, (4) Keshaji Tejaji P.W. 4 Exh. 17, (5) Lilaji Sovanji P.W. 5 Exh. 18, (6) Varvaji Harchandji P.W.6, Exh. 19, (7) Govaji Viraji P.W.7 Exh.20, (8) Thakor Keshaji Manaji P.W.8 Exh.21 and (9) Natvarsinh D. Dodia P.W.9 Exh.22 to prove its case against the appellant. The prosecution also produced documentary evidence such as post mortem notes of the deceased prepared by Dr. Setalwad , certificate of injury of appellant, map of place of incident, Panchnama of place of incident, Panchnama prepared at the time of arrest of the appellant, etc. in support of its case against the appellant. After recording of evidence of prosecution witnesses was over, the Ld. Addl. Sessions Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his statement as required by section 313 of the Code of Criminal Procedure. In his further statement the appellant claimed that on the night of incident he had gone to field in connection with agricultural work, where his brother had come and informed him that his wife was ill, as a result of which he had gone to his house and found his wife lying unconscious. The appellant further stated that several persons had collected near his house and at about 10.00 a.m. those who had collected near his

house had caused nail scratches to him. However, it is relevant to notice that the appellant did not examine any witness in support of his case as claimed in his further statement which was recorded u/S. 313 of the Code of Criminal Procedure, 1973.

5. On appreciation of evidence adduced by the prosecution, the Ld. Judge deduced that the deceased had died due to asphyxia which had resulted from homicidal strangulation and, therefore, homicidal death of the deceased was proved by the prosecution. The Ld. Judge noticed that it was not claimed by the prosecution that the incident in question was witnessed by any one and that the whole case against the appellant was based on circumstantial evidence. The Ld. Judge referred to law relating to circumstantial evidence and proceeded to consider the circumstances, which were proved by the prosecution against the appellant. The Ld. Judge held that the appellant and his wife were staying together and none else was residing with them and, therefore, as homicidal death of the deceased had taken place, a reasonable explanation was expected from the appellant, but the appellant did not offer any explanation. According to the Ld. Judge, the only explanation that was sought to be given by the appellant was that he was away from his house to field and since he was not present during the night between January 28/29, 1992, he could not be held responsible for the death of his wife. This plea of alibi of the appellant came to be rejected by the Ld. Judge as except his bare words, no other material in support thereof was adduced by the appellant. The Ld. Judge of the trial Court held that the appellant had every opportunity of committing crime in question and that the circumstances proved by the prosecution were of conclusive nature and tendency establishing that the appellant had committed murder of his wife. According to the Ld. Judge there was a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with innocence of the accused and that the circumstances established that within all human probabilities the act must have been done by the appellant. In view of the above referred to conclusions, the Ld. Judge by judgment dated July 31, 1992 has convicted the appellant u/S. 302 of the Indian Penal Code and sentenced him to suffer RI for life which has given rise to the present appeal.

6. Mr. Jiten Budhdhbhatti, learned counsel appearing in support of this appeal has taken us through the judgment which is impugned in the appeal as well as the oral and documentary evidence on record. It was

contended on behalf of the appellant that motive for commission of crime is not established by the prosecution and as one of the important ingredients in a case based on circumstantial evidence is not proved by the prosecution, the impugned judgment should be set aside. The learned counsel urged that the evidence on record does not establish beyond reasonable doubt that the appellant and deceased Taraben were together on the date of incident and as possibility of stranger having committed crime is not ruled out, atleast benefit of reasonable doubt ought to have been given to the appellant. The learned counsel referred to law on circumstantial evidence and claimed that as the circumstances sought to be relied upon by the prosecution are not established and the chain of evidence furnished by the circumstances which are proved, is not complete, the appellant could not have been convicted under Section 302 of the Indian Penal Code. Further it was pleaded that the evidence of witness Keshaji Manaji Thakor, P.W.8 Exh. 21 establishes that the deceased had died due to cerebral fever and, therefore, the judgment impugned should be set aside. What was claimed on behalf of the appellant was that during the night of January 28/29, 1992, the appellant was at field, where his brother had informed him that the deceased had fallen ill and as the appellant had no opportunity to commit the crime in question, the appeal should be accepted.

7. Mr. D.P. Joshi, Ld. APP after referring to the evidence of prosecution witnesses and more particularly evidence of witness Divaben Babuji P.W. 1 Exh.9, asserted that the motive for commission of crime was that the appellant had suspicion about fidelity of the deceased and as the motive is proved as required by law, no benefit of doubt should be given to the appellant on the ground that the prosecution has failed to prove motive in the case. The learned counsel for the State contended that the appellant and his deceased wife were staying together and none else except a little child aged 2 years was residing with them and as the death had occurred in suspicious circumstances, a reasonable explanation was expected from the appellant and the appellant having failed to offer any reasonable explanation, the judgment impugned in the appeal should be upheld. The learned counsel for the State urged that the appellant and others had given false information to the relatives of the deceased to the effect that deceased was suffering from cerebral fever and this conduct of the appellant being inconsistent with his innocence should be taken into consideration while assessing the circumstantial evidence on record. What was emphasized

by the learned counsel for the State was that the plea of alibi of the appellant is an after thought attempt and as the appellant has failed to adduce any evidence in support of the plea of alibi, except his bare words, the appeal should be dismissed. According to the learned counsel for the State, the circumstances established are consistent only with the hypothesis of the guilt of the accused and are not explainable on any other hypothesis except that the appellant is guilty and, therefore, the appeal should be dismissed.

8. We have taken into consideration the submissions advanced at the bar and reappreciated the whole evidence on record.

9. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence regarding the incident is tendered before the Court. Admittedly the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is or are, not decisive. Where a case rests squarely on circumstantial evidence, various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration. But this does not mean that before the prosecution can succeed in a case resting upon the

circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. In Sharad v/s. State of Maharashtra, AIR 1984 S.C. 1622 after referring to earlier case law, the Supreme Court has summarized the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may" be established.
(2) The facts so established should be consistent only with the hypothesis of the guilt of accused, that is to say, that they should not be explainable on any other hypothesis except that the accused is guilty.
(3) The circumstances should be of a conclusive nature and tendency.
(4) They should exclude every possible hypothesis except the one to be proved.
(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, and
(6) where the various links in a chain are themselves complete, then a false plea or false defence may be called into aid only to lend assurance to the Court.

If the aforesaid various conditions are fulfilled, only then the Court can use a false explanation or false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts, called primary or basic on the one hand and inference of facts to be drawn from them on other. With regard to the proof of basic or primary facts the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference or guilt of the accused person or not, and in dealing with this aspect of problem, the doctrine of benefit of doubt applies. Although there should be no missing link in the case, it is not essential that every one of the links must appear on the surface of the

evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences or presumption, the Court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

10. In the light of the above referred to principles, we will now consider the question whether the case against the appellant is proved or not. The first circumstance, which is sought to be proved by the prosecution against the appellant is that the deceased died a homicidal death. The fact that deceased Taraben died a homicidal death is amply proved by the evidence of Dr. Tusharbhai Mohanbhai Setalwad , who is examined as P.W.2 at Exh.10. This witness has stated that he was Medical Officer of Community Health Centre, Kheralu and that he had performed autopsy on the dead body of Taraben on January 30, 1992. The Medical Officer has stated that on examination of the dead body of Taraben he had found following injuries :-

(1) A transverse brownish black bruise of about 11 cm long and 4.5 cm broad on left end and 3 cm. broad on right end size was situated on lower end of the neck. On palpation, thyroid notch was found fractured and depressed. Two small abrasions (one of 0.5 cm x 0.1 cm and other of pin head size) were present in the right side of the bruise near central line of neck.

(2) A linear abrasion of 6 cm in size, oblique in direction situated on the anteror posterior aspect of the middle one third of right forearm.

(3) Brownish black bruise of 5 cm. x 3.5 cm. in size, irregular in shape on the anterior lateral aspect of the middle one third of right arm.

(4) Brownish black bruise of 4 cm x 3 cm in size, irregular in shape situated on the anterior aspect of the upper one third of the left forearm.

(5) Brownish red bruise of 15 cm. x 8.5 cm. in size, irregular in shape on the anterior lateral aspect of the right side of the thoraco abdominal region and also a red bruise of 10.5 cm. x 6.5 cm. in size, irregular in shape, situated on the anterior lateral aspect of the left side of the thoraco abdominal region.

(6) A superficial cuticular abrasion of 2.5 cm. x 2 cm. in size, irregular in shape, in front of right knee joint, patlelar region.

(7) A superficial cuticular abrasion of 3 cm. x 2.5 cm. in size, irregular in shape, situated in

front of left knee joint region.

On internal examination, the doctor noticed following injuries :-

On fine disection of neck, subcutaneous tissue, anterior muscles of neck and thyroid glands were superficial and deep neck, veins were engorged. On further disection thyroid cartilage and trachea made clear and on palpation there was obvious vertical fracture of thyroid cartilage and thyroid notch found compressed. Upper four cartilaginous trachea rings were also found fractured. Then after pharynx was cut from possible higher level and posterior aspect was visualized. Larynx and trachea were opened. Epiglottis mucus membrane of pharynx larynx and trachea was congested and hemorrhagic spots were present. There was a fine froth covering mucus membrane of trachea and larynx. Presence of fracture of thyroid cartilage and upper four trachea rings were confirmed.

The Medical Officer, after conducting post mortem on dead body of Taraben, had issued certificate mentioning that she died due to "asphyxia", which was result of homicidal strangulation. According to the doctor, the deceased had died approximately 24 to 30 hours before post mortem time. In para. 18 of his deposition the doctor clearly stated that the injuries sustained by the deceased on her neck were sufficient in the ordinary course of nature to cause death. In cross-examination the doctor specifically stated that it was not possible for a person to cause his own death by throttling his neck. On reappreciation of evidence of Medical Officer, it becomes evident that the fact that the deceased had died a homicidal death stands amply proved and it is not correct to say that the deceased had died because of cerebral fever. Thus, the finding that deceased Taraben had died a homicidal death being just and having been borne out from the evidence on record, is hereby upheld.

11. The second circumstance sought to be proved against the appellant is that at the time of the incident, the family of the appellant consisted of himself, his deceased wife Taraben and minor daughter aged 2 years and that the appellant was staying separate from his brother and mother. Witness Divaben Babuji P.W.1 Exh.9 has stated that her daughter Taraben was married to the appellant and that Taraben was staying with the appellant at village Malekpur. She has further

stated that during the subsistence of marriage, Taraben had given birth to a girl child named Nirma and that marriage of Taraben with the appellant had taken place about 5 years before her deposition was recorded. We may state that her deposition before the Court was recorded on July 23, 1992. Witness Rajiben Shambhuji P.W.3 Exh.13 has also stated in her substantive evidence before the Court that about 5 years before, marriage of deceased Taraben had taken place with the appellant and that the deceased was staying with the appellant. The evidence of witness Thakor Keshaji Manaji P.W.8 Exh.21 shows that he is the real brother of the appellant. According to this witness, he has constructed a house in his field where he is staying, whereas the appellant with his wife was staying in Bhanvas of village Malekpur and his parents were staying with youngest brother Nenaji in the field. We may state that witness Thakor Keshaji Manaji had not fully supported the case of the prosecution and, therefore, was permitted to be cross-examined by the Public Prosecutor. However, his evidence regarding the fact that the appellant and his wife were staying together stands corroborated by other evidence on record and, therefore, that part of his evidence can be relied on. The discussion of evidence of above referred to witnesses establishes the fact that the appellant and his wife were staying together and none else except a minor child aged 2 years was residing with them.

12. The third circumstance which is sought to be proved by the prosecution against the appellant is that the appellant had suspicion about character of the deceased and had therefore subjected the deceased to mental as well as physical cruelty. In this regard we notice that witness Divaben Babuji P.W. 1 Exh.9 has specifically stated that the appellant was beating the deceased and therefore off and on the deceased was coming to her parental home, but she was persuading the deceased to return to her matrimonial home. The witness has clearly and firmly stated that her son-in-law i.e. the present appellant was entertaining a baseless doubt and was therefore, beating the deceased. The witness denied that she had stated in her police statement that her daughter had become enemic and therefore, quarrel was taking place between her and her husband. A reasonable reading of the evidence of this witness makes it evident that her assertion that the appellant had doubt about character of the deceased and therefore, was beating the deceased is not seriously challenged on behalf of the appellant. Further the evidence of witness Rajiben Shambhuji P.W.3 Exh. 13 establishes that the deceased was being subjected to physical cruelty by the appellant

and therefore, the deceased was off and on coming to her parental home. According to this witness, deceased Taraben had informed her that the appellant had suspicion about her character and therefore was beating her. We may state that the whole evidence of this witness has gone unchallenged and though opportunity was given to the defence, the witness was not cross-examined at all. The discussion of evidence of the above referred to two witnesses establishes the fact that the appellant had suspicion about character of the deceased and that he had strong motive to commit the crime in question. We may state that it is not necessary in every case of circumstantial evidence that prosecution must prove motive for commission of crime and that in absence of proof of motive, the accused can never be convicted, though other clinching circumstances are proved by the prosecution. However, in the facts of the present case, we find that the prosecution has proved the motive which must have prompted the appellant to commit the crime in question.

13. The fourth circumstance which is sought to be proved by the prosecution is that after the death of the deceased, a calculated attempt was made by the appellant and his relatives to mislead the relatives of the deceased and others by informing them that the deceased had died due to cerebral fever. We may observe that the evidence of conduct of the appellant after the incident would be a relevant piece of evidence in view of the provisions of Section 8 of the Indian Evidence Act and, therefore, the prosecution is entitled to place reliance on the conduct of the appellant after the incident. The evidence of witness Divaben Babuji P.W.1 Exh.9 shows that after the incident, three to four persons had come in a jeep from village Malekpur and had informed her that the deceased was suffering from cerebral fever and was not speaking. According to this witness, on receipt of this information she had immediately gone to the house of her son-in-law and found that the deceased had died. She has specifically stated that she had found that there was swelling on the neck of the deceased. We may state that the assertion made by this witness about the fact that three to four persons had come in a jeep to village Malekpur and had informed her that the deceased was suffering from cerebral fever is not challenged in the cross-examination of this witness at all. The witness denied the suggestion made by the defence that the deceased was fed up with illness and had therefore committed suicide. The evidence of witness Thakor Keshaji Manaji P.W. 8 Exh. 21 would show that he had gone to the house of the appellant as he had learnt from

her mother and brother that the deceased was suffering from fever. It is relevant to notice that this witness, who is real brother of the appellant, had lodged information with the police, stating inter-alia therein that the deceased was suffering from fever and had therefore died. The discussion of the evidence of these witnesses would indicate that after the incident a calculated move was made to mislead one and all that the deceased had died due to cerebral fever, but the true cause of death became apparent only when autopsy on the dead body was performed.

14. The above discussion of evidence on record makes it clear that following facts have been proved by the prosecution beyond reasonable doubt :-

i. That the deceased died homicidal death.
ii. That the appellant and his wife were staying together and none else except a minor child aged 2 years was residing with them.
iii. The appellant had suspicion about the character of the deceased and had thus strong motive to commit crime in question.
iv. After the commission of crime a calculated attempt was made to mislead all concerned to establish that the deceased had died due to cerebral fever.

From the record of the case, we notice that all these circumstances proved were put to the appellant during his examination under Section 313 of the Code of Criminal Procedure, 1973 and the appellant has merely denied the same. We notice that the Supreme Court in (1) Vasa Chandrasekhar Rao v/s. Ponna Satyanarayana, (2000) 6 S.C.C. 286 and (2) Geetha v/s. State of Karnataka (2000) 10 S.C.C. 72 while explaining law regarding circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination u/S. 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against accused. As observed earlier, the incriminating circumstances proved were put to the appellant, but in his further statement recorded u/S. 313 the appellant has merely denied the same and therefore, this denial will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant.

15. As held earlier, the appellant and his wife were staying together and none else was residing with them

except a minor child aged 2 years. The factum of homicidal death of the deceased is proved beyond reasonable doubt by the prosecution. Under the circumstances, a reasonable explanation was expected from the appellant when death of his wife occurred in suspicious circumstances. The only explanation that was sought to be given by the appellant was that he was away from his house on the night of January 28/29, 1992 and since he was not present during the relevant time, he could not be held responsible for death of his wife Taraben. This plea of alibi of the appellant, in our considered view, is an after thought attempt. Except his bare words, no other material in support thereof was adduced by the appellant. In view of the absence of any material on record, the trial Court was right in rejecting the plea of alibi. Thus the false plea of alibi will have to be called into aid to lend assurance to the Court that in all human probability the act must have been done by the appellant. The evidence on record would indicate that the appellant must have been agitated because of suspicion about the character of the deceased. As observed earlier, the fact that the deceased died a homicidal death is proved beyond reasonable doubt. It is not suggested to any of the witnesses that murder of the deceased was committed by any unknown person and the only defence suggested to the witnesses examined was that the deceased had died either due to cerebral fever or that she had ended her life as she was fed up with illness. The circumstances proved on the record of the case make it evident that in all human probability the act of murder of the deceased must have been done by the appellant. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had caused death of deceased Taraben and is rightly convicted u/S. 302 of the Indian Penal Code. Having regard to the totality of the facts and circumstances of the case, we do not find any substance in the appeal and the appeal deserves to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed.

The Muddamal is to be disposed of in terms of the direction given by the learned Judge in the impugned judgment.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.